Supreme Court, U.S.
FILED
JUN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Milton Hirsch
Counsel of Record
Suite 617, Dadeland Towers
9200 South Dadeland Blvd.
Miami, Florida 33156
(305) 665-4843

Attorney for Amicus Curiae
The National Association of
Criminal Defense Lawyers

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STATEMENT OF INTEREST OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. NACDL was founded nearly three decades ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of criminal law, and to encourage integrity, independence and expertise among defense lawyers.

In California vs. Ciraolo, 476 US 207, 106 S.Ct. 1809 (1986), this Court had occasion to consider the constitutionality of the warrantless aerial search of a private home. The proliferation of such cases in recent years[1] suggests that the facts and principles of Ciraolo

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[1] See the extensive catalogue of cases appearing at footnotes 14 and 15 in the Brief of Petitioner, pp. 21-2.

are of unusual topical significance to the bench and the criminal defense bar. The Florida Supreme Court had Ciraolo before it when it decided State vs. Riley, 511 So.2d 282, esp. at 284 et. seq. (Fla. 1987). Finding important factual differences between the two cases, the Florida court distinguished Ciraolo and disallowed the warrantless search in Riley.

In his brief before this Court, Respondent Riley underscores those factual distinctions and demonstrates that they justify the differing results. We leave the parsing out of factual distinctions to Respondent Riley. Our argument is purely a legal one. We seek to demonstrate herein that Ciraolo was wrong as a matter of law because its treatment of the second prong of the Katz test represents a complete and conceptually unjustified departure from settled doctrine. We argue further that Riley presents an ideal opportunity for this Court to recede from

Ciraolo and return to the mainstream of its own jurisprudence.

Petitioner and Respondent herein have consented to NACDL's participation as amicus curiae, and letters of consent have been filed with this Court. NACDL is mindful of the general rule disfavoring oral argument by amici, see Rule 38, Rules of the Supreme Court of the United States; cf. Wheeler vs. Barrera, 414 US 1140 (1974) with Train vs. City of New York, 419 US 818 (1974). Nevertheless, because of the extraordinary impact that this case will have on the development of Fourth Amendment jurisprudence, and because NACDL's position herein differs in important ways from that of Respondent and other amici, NACDL respectfully moves for leave to present a brief oral argument.

SUMMARY OF THE ARGUMENT

In its Brief, Petitioner concedes that, "aerial surveillance is a new application of the

broad constitutional principles behind the prohibition of warrantless search and seizure", Brief of Petitioner at 14. Although the application may be new, the principles themselves remain unchanged. Where a householder has put the world on notice of his expectation of privacy as to his home and property, society is constitutionally bound to respect that privacy; and to refrain from violating it, not merely in the most convenient or commonplace manner, but from any distance or vantage point, and by any technology. This Court could have no better opportunity than that presented by the instant facts to instruct law enforcement officers that, although modern aeronautics may have given them the ability to rise above rooftops and fences, it does not entitle them to rise above the warrant requirement.

ARGUMENT

I. RILEY'S EXPECTATION OF PRIVACY IN HIS HOME AND CURTILAGE AGAINST PURPOSEFUL

POLICE SURVEILLANCE FROM ABOVE WAS REASONABLE.

A. Katz and the Significance of Navigable Public Airspace.

On September 2, 1982, Santa Clara police received an anonymous tip that Dante Ciraolo was growing marijuana in his backyard. The yard itself was entirely enclosed by a six-foot outer fence and a ten-foot inner fence, so two police officers obtained a plane and flew over Ciraolo's house at an altitude of 1,000 feet. From that vantage point they observed and photographed marijuana plants within the curtilage of Ciraolo's home. It was only then that they obtained a search warrant. Ciraolo at _____, 1810-11.

In assessing Ciraolo's challenge to the constitutionality of such a warrantless search, this Court applied the familiar two-prong test of Katz vs. United States, 389 US 347, 360 (1967) (Harlan, J., concurring). As to the first, or subjective prong, the Court readily conceded that

by virtue of the six- and ten-foot fences surrounding his property Ciraolo had, "(c)learly--and understandably--met the test of manifesting his own subjective intent." Id. at _____, 1811.[2] But the Court found that the second element of Katz, requiring that a subjectively-expressed expectation of privacy also be objectively reasonable, was not present, and this for two reasons: first, it was unreasonable for Ciraolo to expect that he had secured the privacy of his home and curtilage from an observer in navigable airspace[3] acting in a physically nonintrusive fashion. The police officers in question made their observations from a public vantage point, much as if they had been walking

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2 Similarly in Riley, the Florida Supreme Court found that, "As in Ciraolo, there is no question in this case that the first prong of the Katz test has been met." Riley at 286.

3 49 USC App. 1304, 1301 (29). See discussion infra at 7-8.

down a public thoroughfare. Second, it was unreasonable to consider that Ciraolo had secured the privacy of his home and curtilage from purposeful police overflights when he had clearly not secured his privacy from ordinary commercial flights which might happen to pass over his home, and from which a disinterested passenger might happen to catch a fleeting glimpse of his curtilage.

At common law, he who owned the land owned up to the heavens. Under modern federal law, the homeowner's share of the heavens ends where navigable airspace begins. Navigable airspace is simply that airspace above the minimum altitudes of flight as prescribed by regulation. 49 USC 1304, 1301 (29). The minimum altitude for a fixed-wing aircraft is 1,000 feet over a congested area and 500 feet over a non-congested area. 14 CFR 91.79(b) and (c). Helicopters may be lawfully operated at less than minimum

altitudes so long as the operation is conducted without hazard to persons or property on the surface. 13 CFR 91.79(d).

Prior to Katz, the householder's Fourth Amendment protection was physically contiguous with his common law real property rights. See, e.g., Silverman vs. United States, 365 US 505 (1961); Goldman vs. United States, 316 US 129 (1942). Searches that were the equivalent of trespass were barred. Others were not. This archaic analysis has been entirely overthrown by the recognition in Katz that the Fourth Amendment protects people, not places. From the standpoint of noise, danger, and disruption of peace of mind, low altitude flyovers are more intrusive than high altitude flyovers; and it is probably true that, measured by these criteria, the lower the flight, the greater the intrusion into interests that the Fourth Amendment is calculated to protect. But to view navigable airspace as a property line in the

sky, and to view aerial surveillance below that property line as mere impermissible trespass, is an outmoded and incorrect application of the Fourth Amendment. Indeed aerial searches conducted from the highest altitudes and employing advanced photographic equipment are an infinitely more invidious threat to protected privacy, because they can be conducted without the citizen even knowing of their existence. Whatever the evils of a low altitude helicopter surveillance--"the thrashing of the rotor, the clouds of dust, the earsplitting din", NORML vs. Mullen, 608 F.Supp. 945, _____ (N.D.Cal. 1985)--they at least serve to put the householder on notice of the fact of police scrutiny. He may curtail his activities, relocate them to a basement, or even leave the jurisdiction. High altitude surveillance, especially when coupled with high-tech photographic equipment, affords the householder no notice of observation, and is for that reason all

the more inconsistent with and destructive of Fourth Amendment values. The householder goes on with private, perhaps intimate, family activities, blithely unaware that Big Brother is watching.

The locution "the Fourth Amendment protects people, not places" is associated with Katz, but the notion embodied in that locution was fully entrenched in the jurisprudence of the Fourth Amendment decades before Katz. See, e.g., Goldman vs. United States, supra, at 139 (Murphy, J., dissenting) ("whether the search of private quarters is accomplished...by new methods of photography that penetrate walls or overcome distances, the privacy of the citizen is...invaded by agents of the government and intimate personal matters are laid bare to view. Such invasions of privacy, unless they are authorized by a warrant...are at one with the evils which have heretofore been held to be within the Fourth Amendment"); Olmstead vs. United States, 277 US

438, 471 (1920) (Brandeis, J., dissenting); Boyd vs. United States, 116 US 616, 627-30 (1886) ("it is not the breaking of [the householder's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security [and] personal liberty"). Navigable public airspace is nothing more than a horizontal property line in the sky. Like a vertical property line running with the land, it tells us little or nothing about the contours of the personal rights that the Fourth Amendment is calculated to protect.

Ciraolo's reliance on public navigable airspace and the "physically non-intrusive" manner in which the search visited upon Ciraolo (and upon Riley) was conducted is in direct derogation of Katz, and should for that reason be abandoned. If modern aeronautics has provided government with the wherewithal to observe and record minute

details of family activity taking place on the porch, in the house, or within an enclosed backyard, then it has provided government with the wherewithal to violate the householder's privacy. It is plain nonsense to suggest that "the people" can be "secure in their persons, houses, papers, and effects" while the government looks on from above. If the framers had meant to add at the close of the first clause of the Fourth Amendment, "violated by trespass", or "violated in a physically intrusive manner", they could have done so. They did not.

B. The Objective Reasonableness of Riley's Expectation of Privacy.

As empirical support for the remarkable conclusion that Ciraolo's expectation of privacy was objectively unreasonable, the Court offered this equally remarkable observation: "any member of the public flying in (navigable) airspace who glanced down could have seen everything that...(the police) officers observed." Ciraolo

at _____, 1813. If this is true--if Ciraolo's expectation of privacy was objectively unreasonable simply because a passenger on a commercial airline might catch a fleeting glimpse of an unidentified and unidentifiable backyard--then one of two corollaries necessarily follows. Either there exists no set of circumstances pursuant to which Ciraolo's expectation of privacy in his own curtilage would be objectively reasonable; or, Ciraolo's six- and ten-foot fences being insufficient to support the reasonableness of such an expectation, it would be necessary for him to encase his curtilage and backyard under some kind of opaque dome.

If the former conclusion is the true teaching of Ciraolo and the necessary holding in Riley, then Ciraolo is truly the most remarkable opinion of our times, overthrowing not only the entire teaching of Katz and its progeny but the entire jurisprudence of the curtilage doctrine as

well. See generally Oliver vs. United States, 466 US 170 (1984); Taylor vs. United States, 286 US 1 (1932); United States vs. Williams, 581 F.2d 451 (5th Cir. 1978) cert. denied 440 US 972 (1979); Walker vs. United States, 225 F.2d 447 (5th Cir. 1955); State vs. Rickard, 420 So.2d 303 (Fla. 1982); Norman vs. State, 379 So.2d 643 (Fla. 1980); State vs. Fierge, 673 SW.2d 855 (Mo. App. 1984); Brown vs. Okalahoma City, 721 P.2d 1346 (Okla. App. 1986). If the latter alternative is true--if the Ciraolos and Rileys of this world must encase their homes and yards in opaque domes in order to assure themselves that their expectations of privacy will be viewed as objectively reasonable by society--this Court must abandon an equally lengthy and venerable line of cases holding that just the opposite is true. As one court has observed, such extreme measures would cause the householder to:

> sustain the...intangible cost of shutting out the sunlight and

> fresh air which give such a space its precious character. Surely, one has reason to expect that he need not "encase himself" (and his property) in a light-tight, airproof box.

People vs. Cook, 710 P.2d 299, 305 (Cal. 1985) citing Lorenzana vs. Superior Court, 511 P.2d 33 (Cal. 1973). Accord, State vs. Ward, 617 P.2d 568, 573 (Hawaii 1980); Wheeler vs. State, 659 SW.2d 381, 390 (Tex. Crim. App. 1982); Riley at 289 fn. 11.

A more reasonable position is that urged in Cook, supra:

> The fact that government officials or members of the civilian public might be expected, for one reason or another, to enter a place or see or hear the activities within, does not necessarily preclude reasonable claims of privacy of intensive spying by police officers looking for evidence of crimes.... One's yard may unavoidably be exposed to casual glances by passing aircraft, but he may still reasonably assume that it will not be intently examined by government agents who are flying over for that

specific purpose.

Cook at 304. Accord, Ciraolo, supra at _____, 1818 (Powell, J., dissenting); Katz at 351-2 ("what [the householder] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected").

If the sense of privacy afforded by walls and fences is objectively unreasonable because it can be frustrated by airplanes and helicopters, then it must follow that the privacy the householder claims in the innermost sanctum of his house will be rendered objectively unreasonable when helicopters and airplanes are fitted with infrared detection devices or other scientific equipment capable of penetrating hearth and home. Against such a notion this Court should firmly set its face.

> The "reasonableness" of an individual's expectation of privacy is not defined solely by technological progress. We reject the Orwellian notion that precious liberties derived from

> the framers simply shrink as the government acquires new means of infringing them.

Cook at 305. Accord, Riley at 286 ("private activities do not lose their Fourth Amendment protection merely because technology exists which enables the police to view the activities from an otherwise non-intrusive vantage point"); LaFave, "The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence", 28 Arizona Law Review 291, 307 (1986) ("it hardly makes sense to read Katz as meaning that we assume the risk of whatever technology the government can bring to bear upon its investigative efforts").

The house need not be invulnerable for the householder's expectation of privacy to be reasonable. Rain may enter through the roof, wind may enter through the windows, television and radio waves may enter through the walls themselves; but the uninvited eye of government may not enter. It is not the roof, nor the

window, nor even the walls themselves that bar the uninvited eye. It is the Fourth Amendment.

II. THE AERIAL SURVEILLANCE OF RILEY'S HOME AND CURTILAGE WAS A SEARCH, REQUIRING EITHER A WARRANT OR CONFORMITY TO A RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT.

Dictionaries generally define "to search" as "to make a thorough examination" or "to look over carefully in order to find something". Similarly, case law has traditionally used the term "search" to mean "some exploratory investigation...a looking for or seeking out". See generally C.J.S. Searches and Seizures Section 1; also Hale vs. Henkel; 201 US 43 (1906). Where police fly over a particular home or enclosed yard for the express purpose of checking that home or yard for marijuana plants, it seems silly to suggest that what has taken place is not a search. Police aerial surveillance does not happen by accident. Such "exploratory investigation", such "looking for or seeking out" directed at the home

or curtilage is, in fact, a search. See generally Cook, supra; People vs. Sneed, 108 Cal.Rptr. 146 (1973); accord, State vs. Kender, 588 P.2d 447 (Haw. 1979); State vs. Barns, 390 So.2d 1243 (Fla. 1st DCA 1980). There should be no confusion about the role, if any, to be played by Katz in characterizing an act of police aerial surveillance as a search. The Katz analysis does not answer the question: did a search take place? Katz answers the question: assuming a search took place, is it one to which this particular defendant may object?

It is conceded that the search of Riley's home, curtilage, and yard was conducted without a warrant. Thus to pass constitutional muster, the search must fall within one of the narrowly tailored warrant exceptions. From the language in Ciraolo that the police were lawfully situated in navigable public airspace at the time of the search flows the implication that the search

itself was reasonable under some version of the "plain view" exception to the warrant requirement. If this implication from Ciraolo was intentional, it should be discarded as clearly at odds with the jurisprudence of the "plain view" exception. United States vs Bassford, 812 F.2d 16, 19 (1st Cir. 1987) (John Minor Wisdom, J.) ("Ciraolo...narrow[s] the protection of the Fourth Amendment, and...over-expand[s] the plain view doctrine").

Plain view discoveries must be inadvertent, not purposeful. Coolidge vs. New Hampshire, 403 US 443, 469 (1971); Texas vs. Brown, 460 US 730, 737 (1983). While at least one member of this Court has expressed reservations about the viability of the inadvertence requirement, see Arizona vs. Hicks, _____ US ____, 107 S. Ct. 1149, 1155 (1987) (White, J., concurring), the inadvertence requirement is thoroughly entrenched in the jurisprudence of the

plain view exception and consistently relied upon as such by state and federal courts. See United States vs. $10,000 in U.S. Currency, 780 F.2d 213 (2d Cir. 1986); United States vs. Whitten, 706 F.2d 1000 (9th Cir. 1983) cert. denied 465 US 1100; United States vs. Taylor, 683 F.2d 18 (1st Cir. 1982) cert. denied 459 US 945; United States vs. Freeman, 685 F.2d 942 (5th Cir. 1982); United States vs. Weber, 668 F.2d 552 (1st Cir. 1981) cert. denied 457 US 1105; United States vs. Liberti, 616 F.2d 34 (2d Cir. 1980) cert. denied 446 US 952; United States vs. Antill, 615 F.2d 648 (9th Cir. 1980) cert. denied 449 US 866; United States vs. Sanders, 631 F.2d 1309 (8th Cir. 1980) cert. denied 449 US 1127; United States vs. Hare, 589 F.2d 1291 (6th Cir. 1979); United States vs. Diaz, 577 F.2d 821 (2d Cir. 1978); United States vs. Schire, 586 F.2d 15 (7th Cir. 1978); United States vs. Duckett, 583 F.2d 1309 (5th Cir. 1978); United States vs. Anderson, 552 F.2d 1296 (8th

Cir. 1977); United States vs. Johnson, 541 F.2d 1311 (8th Cir. 1976); United States vs. Martin, 640 F.Supp. 543 (E.D.Ark. 1986); United States vs. Gravatt, 506 F.Supp. 378 (E.D. Pa. 1981); Matter of 2029 Hering Street, Bronx, N.Y., 464 F. Supp. 164 (S.D.N.Y. 1979); United States vs. Hall, 468 F.Supp. 123 (E.D. Tex. 1979); United States vs. Taibe, 446 F.Supp. 1142 (E.D.N.Y. 1978); affirmed 591 F.2d 1333, cert. denied 444 US 1071; United States vs. Wright, 405 F.Supp. 1236 (E.D.Tex. 1975) affirmed 532 F.2d 1374; see also those cases cited in Texas vs. Brown, supra, at 746 fn. 2 (Powell, J., concurring); but cf. United States vs. Pine, 473 F.Supp. 349 (D.C. Md. 1978).

In NORML vs. Mullen, supra, the government attempted to justify helicopter surveillance of private homes, similar to that visited upon Riley, by reference to the plain view doctrine. The court responded:

> (The government) further suggests that some permutation

> of the "plain view" doctrine protects their prying as a matter of law. Rather, just as a (police officer) on the ground cannot on a whim climb a fence to peer into a house otherwise protected from his view, a (police) helicopter cannot randomly position itself over a home to leisurely contemplate the scene below. Even when (police officers) are at a lawful vantage point, the plain view doctrine "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges".

NORML at 957-8 (citation omitted). Apart from its failure to conform to the inadvertence requirement of the plain view doctrine, the search visited upon Riley also fails the threshold requirement of that doctrine: that the officer, at the time he makes the plain view discovery, be somewhere he has a right to be doing something he has a right to do. It is an aspect of plain view doctrine too fundamental to require citation that, for example, a police officer may have a perfect right to climb a tree to rescue a child's cat, and while in the

tree may happen to observe marijuana growing in Michael Riley's yard, and may then obtain a warrant in reliance on that observation; but that the same officer may not climb the same tree for the express purpose of peering into Michael Riley's yard in hopes of seeing marijuana not otherwise visible. See, e.g., State vs. Adams, 378 So.2d 72 (Fla. 3rd DCA 1979); State vs. Person, 298 N.E. 2d 922 (Ohio, 1973); Pate vs. Municipal Court, 89 Cal.Rptr. 893 (1970); Cohen vs. Superior Court, 85 Cal.Rptr. 354 (1976). The same principle is at work here. The issue before this Court is not whether police may fly over Riley's home, nor even whether they may act upon observations made while flying over Riley's home, but whether, without warrant, they may exploit the power of flight for the express purpose of viewing activities in Riley's home which would otherwise remain private and unseen. That the purposeful nature of given police activity may render

unconstitutional actions which would otherwise be constitutionally inoffensive is hardly a remarkable proposition cf., e.g., Colorado vs. Bertine, _ US _, 107 S.Ct. 738 (1987).

To describe what happened to Michael Riley as anything but a search is to stand the plain meaning of words on its head. The police set out to search Riley's property for marijuana, they searched his property for marijuana, and they found marijuana as a result of their search. Such a search could be conducted only pursuant to warrant or to a recognized exception to the warrant requirement. Because neither condition was met, the search was incompatible with the Fourth Amendment.

III. THE FACTS IN THE INSTANT CAUSE AFFORD THIS COURT AN IDEAL OPPORTUNITY TO RECEDE FROM THE DOCTRINE OF CIRAOLO AND RETURN TO THE MAINSTREAM OF PREVIOUS FOURTH AMENDMENT JURISPRUDENCE.

It would be easy for this Court to

distinguish this case from Ciraolo on the facts. The Florida Supreme Court did just that, focusing on the distinction

> between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that occupants can look through an opening in a roof.

Riley at 287. These factual distinctions are not ephemeral. It would be easy for this Court to distinguish this case from Ciraolo; but it would be wrong. It would be wrong not because what happened to Mark Riley was constitutional but because what happened to Dante Ciraolo was unconstitutional. The difference between helicopters and fixed-wing aircraft is of great moment to aeronautical engineers, but if the veil of privacy which the Fourth Amendment draws over Riley's little corner of the world has been pierced, it matters not, in constitutional terms, which of several mechanical means was used to pierce it. And that his private world was laid

bare from more than 400, or more than 1,000, feet can afford only cold comfort to Riley. Whatever the means by which it is violated, whatever the distance at which it is violated, "the right to be let alone (is still) the most comprehensive of rights and the right most valued by civilized men", Olmstead, supra, at 478 (Brandeis, J., dissenting).

It would be easy for this Court to treat this case as one in which Fourth Amendment protections must be balanced against society's interest in eradicating the curse of illegal drugs. That was clearly the cynosure of the Ciraolo opinion, with its references to "unlawful agricultural pursuits", Ciraolo at _____, 1811 and "illicit drugs", id at _____, 1813.[4] But this

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[4] In the same vein, Petitioner's Brief threatens that if police are required to obtain a warrant before conducting aerial surveillance, "society will be overwhelmed by increasingly sophisticated criminals", Brief of Petitioner at 26; Florida will be "awash in illegal drugs", id. at 27; and we will all be obliged, "to...surrender

case is not about drugs. If Officer Gell, during his airborne search, had looked into Mark Riley's curtilage and seen Riley with another man's wife, this case would not be about adultery. If he had seen Riley sunbathing in the nude, this case would not be about exhibitionism. And if, aided by telescopic equipment, he had seen Riley confessing to a diary thoughts too private, too painful to be confessed even to a priest, this case would not be about penmanship. The Fourth Amendment provides neither more nor less protection to the man who cultivates his garden than it does to the man who cultivates his neighbor's wife, his tan, or his immortal soul.

It would be easy for this Court to decide

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in the war on drugs", id. at 27. Even if these claims were taken at face value--and it is difficult to imagine that the uprooting of Mark Riley's pathetic handful of marijuana stalks constitutes a major victory in the war against drugs--such shameless histrionics have no place in the framing of issues before this Court.

this case by reference to the use or not of advanced technology. Because neither the helicopter nor the camera employed by Officer Gell was anything but ordinary by today's aeronautical and photographic standards, it would be easy to distinguish this case from one in which arcane technology was deployed. It would be easy, but it would be wrong. The householder's Fourth Amendment privacy interest is not to be measured in terms of the complexity of the technology needed to frustrate it. If airborne searches at 500 feet may be invasive of protected privacy, surely airborne searches at 10,000 feet using telescopic equipment which provides a degree of visual acuity that the unaided eye could never achieve are likewise invasive. See, e.g., United States vs. Kim, 415 F.Supp. 1252 (D.Haw. 1976); Barryhill vs. State, 372 So.2d 355 (Ala.Civ.App. 1979); Raettig vs. State, 406 So.2d 1273 (Fla. 1st DCA 1981); Commonwealth vs. Williams, 431 Atl.2d

964 (Pa. 1981).

Petitioner urges this Court in strongest terms to resolve this case by framing a "bright line rule"; indeed the locution "bright line rule" or "bright line test" appears more than a dozen times in Petitioner's Brief. But a bright constitutional rule governing this case and others like it is already in place. It is the familiar rule that a search conducted without warrant is presumptively unreasonable, subject only to certain narrowly-drawn exceptions none of which is remotely applicable here. True, the ruthless application of that rule to these facts would permit Mark Riley to go unwhipped of justice. But as this Court recently observed with simple eloquence, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." Arizona vs. Hicks, supra at ____, 1155.

CONCLUSION

Wherefore, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

Milton Hirsch
Counsel of Record
Suite 617, Dadeland Towers
9200 South Dadeland Blvd.
Miami, Florida 33156
(305) 665-4843
Attorney for Amicus Curiae The National Association of Criminal Defense Lawyers

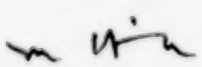
CERTIFICATE OF SERVICE

I, Milton Hirsch, a member of the Bar of this Court, certify that three copies of the Brief of amicus curiae the National Association of Criminal Defense Lawyers were served this 20 day of June, 1988, by United States mail, postage pre-paid upon:

Mark H. Salton, Counsel of Record
7714 Massachusetts Avenue
New Port Richey, FL 34653
Attorney for Respondent Michael A. Riley

Parker D. Thomson, Counsel of Record
Special Assistant Attorney General
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, FL 33131
Attorney for the Petitioner The State of Florida

Respectfully submitted,



Milton Hirsch, Counsel of Record
Suite 617, Dadeland Towers
9200 S. Dadeland Boulevard
Miami, FL 33156
(305) 665-4843
Attorney for Amicus Curiae
The National Association of
Criminal Defense Lawyers